ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, d/b/a/ Ameritech Illinois	)	
Proposed Implementation of High Frequency Portion of Loop (HFPL) /Line Sharing Service	)	Docket No. 00-0393

AMERITECH ILLINOIS' INITIAL BRIEF

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INTRODUCTION

On April 21, 2000, Ameritech Illinois voluntarily filed its HFPL UNE tariff that is the subject of this proceeding. Ameritech Illinois had no legal obligation to file such a tariff, because the tariff implements federal law requirements. Specifically, the tariff implements the requirements for providing requesting carriers with access to the unbundled network element known as the high frequency portion of the loop ("HFPL"), which the FCC established in its December 9, 1999 *Live Sharing Order*. Under the federal Telecommunications Act of 1996 (the "Act"), requesting carriers are entitled to obtain access to the HFPL UNE only through interconnection agreements negotiated and arbitrated under Section 252 of the Act. Nevertheless, as an accommodation to CLECs, Ameritech Illinois filed its HFPL UNE tariff, to enable Illinois CLECs to obtain access to the HFPL UNE without first negotiating and executing an interconnection agreement (or interconnection agreement amendment).

The Commission elected to suspend and investigate Ameritech Illinois' HFPL UNE tariff pursuant to Section 9-201 of the Illinois Public Utilities Act. The scope of the Commission's authority to review this tariff, however, is necessarily limited by federal law. The 1996 Act provides states with the authority to enforce or impose unbundling requirements addressed by Section 251(c)(3) of the Act, such as the HFPL unbundling requirements that are the subject of Ameritech Illinois' proposed tariff, only in the context of interconnection agreements entered into under Section 252 of the Act. And the Act further limits the states' authority in that context to ensuring that the provisions of an arbitrated interconnection agreement comply with existing federal law. *See* 47 U.S.C. §§ 252(c), 252(e). It therefore follows that, in this proceeding, where requesting carriers object to Ameritech Illinois' proposed HFPL UNE terms and conditions, the Commission's review authority encompasses, at most, the authority to determine whether Ameritech Illinois' HFPL UNE tariff comports with the applicable federal law requirements.

Even if federal law did not play a plenary role in determining the scope of the Commission's review authority in this proceeding (which it does), the answer would be no different under state law, because the federal requirements that Ameritech Illinois' HFPL UNE tariff implements already incorporate the same "just and reasonable" standard that exists under state law. Accordingly, irrespective of whether the scope of the Commission's review authority is governed by federal law or state law, the proper scope of this tariff proceeding is limited to ensuring that Ameritech Illinois' HFPL UNE tariff complies with the applicable federal law requirements. In this case, those federal requirements are the requirements that the FCC set forth in this *Line Sharing Order*, nothing more or less.

Predictably, the CLECs in this proceeding ignore these legal limits. Rather than confine themselves to the straightforward question of whether Ameritech Illinois' HFPL UNE tariff complies with the *existing* legal requirements established by the FCC's *Line Sharing Order*, the CLECs seek to convert this proceeding into a general forum for pursuing their respective competitive "wish lists", through which they hope to create new legal rights for themselves, while imposing extensive new legal obligations on Ameritech Illinois. Although the CLECs' desire to have this Commission "legislate" such new rights and obligations in order to promote their own business plans and objectives is not surprising, the Commission should resist the CLECs' siren song. As explained more fully below, adopting the CLECs' proposed changes to Ameritech Illinois' HFPL UNE tariff would be neither lawful nor consistent with sound regulatory policy, for a vast array of reasons.

This is especially the case with respect to the CLECs' proposals – in particular, Rhythyms' Project Pronto unbundling/line card allocation proposal and AT&T's "line-splitting" proposal – that would impose on Ameritech Illinois additional unbundling obligations that not

only do not currently exist under federal law, but also are the subject of ongoing proceedings in front of the FCC, in which the CLECs are actively participating. Besides the myriad legal flaws of these unbundling proposals, this Commission should, as a matter of policy, be especially hesitant to impose new regulations in an emerging market – the market for advanced services – that could very well distort market outcomes in an undesirable way, by compelling excessive, technologically inefficient use of one firm's innovation and assets by other market participants.

The advanced services market is dynamic and already an arena marked by robust competition between and among alternative emerging technologies, such as wireless broadband services and cable modem services (provided, for example, by AT&T and Time Warner over their extensive cable systems). To impose unnecessary obligations on Ameritech Illinois – a major market participant and a major source of innovation – particularly in these circumstances, makes no sense from a policy perspective and flies in the face of the procompetitive goals of the 1996 Act and this Commission.

While Ameritech Illinois fully supports this Commission's goal of implementing the applicable law relating to the encouragement of competition in all telecommunications markets and the Congressional objectives underlying that law, the fact is that the CLECs' proposals, for the reasons explained below, neither comply with the applicable law nor serve the Congressional objectives of encouraging innovation in and deployment of advanced services. The Commission therefore should, and must, reject those proposals.

ARGUMENT

I. SCOPE OF COMMISSION'S AUTHORITY TO MODIFY CONDITIONS OF UNE ACCESS OR TO PRESCRIBE ADDITIONAL UNES.

A. THE SCOPE OF THE COMMISSION'S AUTHORITY TO ORDER CHANGES TO AMERITECH ILLINOIS' VOLUNTARY TARIFF FILING.

1. Ameritech Illinois' HFPL UNE Tariff Is Voluntary And Implements Federal Law.

The FCC's *Line Sharing Order*[1] sets forth Ameritech Illinois' obligations with respect to the new unbundled network element that the *Order* creates and that Ameritech Illinois' proposed tariff addresses--the high frequency portion of the loop ("HFPL" or "HFPL UNE"). The *Line Sharing Order* does not require Ameritech Illinois to tariff those obligations. On the contrary, those obligations are to be implemented through the interconnection agreement negotiation and arbitration processes (or through the Statement of Generally Available Terms ("SGAT") process) set forth in Section 252 of the Act, as the *Line Sharing Order* recognizes. *Id.*, ¶¶ 158-160, 167. By voluntarily filing an HFPL UNE tariff that provides CLECs with an additional way to obtain access to the HFPL UNE, Ameritech Illinois has gone beyond what federal law requires. Put simply, Ameritech Illinois' voluntary tariff offering is an accommodation to CLECs. In particular, as a result of the tariff, CLECs will be able to obtain access to the HFPL without entering into an interconnection agreement.

From both a legal and a policy perspective, the voluntary nature of Ameritech Illinois' HFPL UNE tariff filing, and the fact that the tariff implements federal law requirements under the Act, are significant. As a legal matter, as more fully explained below, the Commission lacks

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[1] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket 98-147, Fourth Report and Order in CC Docket No. 96-98, (rel. December 9, 1999) ("*Line Sharing Order*").

the legal authority to order Ameritech Illinois to tariff the requirements established by Section 251(c) of the Act, including the unbundling requirements imposed by Section 251(c)(3). In other words, if Ameritech Illinois had never filed an HFPL UNE tariff, the Commission could not order Ameritech Illinois to do so. Likewise, if Ameritech Illinois chose to withdraw its HFPL UNE tariff, the Commission could not order Ameritech Illinois to reinstate it. It necessarily follows that, to the extent the Commission has any authority under federal law to review Ameritech Illinois' HFPL UNE tariff, that authority is limited to ensuring that the tariff complies with existing obligations imposed by the applicable federal law, namely, Section 251(c)(3) of the Act and the FCC's rules implementing Section 251(c)(3).

Even if the Commission's authority were not so circumscribed by federal law (which it is), the Commission's authority under state law is similarly limited. Under Section 9-201 of the Illinois Public Utilities Act ("PUA"), the Commission is authorized to require changes to a tariff only to the extent that such changes are required to render the tariff "just and reasonable." *See* 220 ILCS 5/9-201. Because Ameritech Illinois' HFPL UNE tariff is a voluntary filing that provides CLECs with an UNE offering that they could not otherwise obtain via tariff, and because it implements federal law requirements that already incorporate a "just and reasonable" standard (*see* 47 USC § 251(c)(3)), the Commission must conclude that Ameritech Illinois' HFPL UNE tariff is "just and reasonable" so long as that tariff complies with existing federal law. To hold otherwise would mean that states could nullify a determination by Congress or by the FCC that particular UNE terms and conditions are "just and reasonable" -- a result that is precluded by the Supremacy Clause of the United States Constitution. And even if this Commission disagrees with the plenary role that federal law plays in this tariff proceeding, neither this Commission nor the Illinois courts have ever held that the type of far-reaching tariff

changes that the CLECs are seeking in this case -- changes that would add entirely new unbundling obligations to, and radically transform the product definition and provisioning processes for, Ameritech Illinois' HFPL UNE offering -- are within the scope of the tariff review authority that Section 9-201 of the PUA grants to the Commission. To the contrary, the test under Section 9-201 is whether Ameritech Illinois' proposed HFPL UNE tariff would be unjust or unreasonable absent the changes proposed by the CLECs -- not whether such changes comport with a particular CLEC's, or a particular group of CLECs', "wish list" designed to promote a particular set of business plans and objectives. Accordingly, even if this Commission were to conclude (wrongly) that federal law does not preempt Illinois law in the context of reviewing Ameritech Illinois' HFPL UNE tariff, most, if not all, of the CLECs' proposed tariff changes would still be unlawful.

Additionally, from a policy perspective, even if the Commission had the legal authority (which it does not have) to impose new unbundling obligations on Ameritech Illinois in the context of this tariff proceeding, it should not do so. Ameritech Illinois voluntarily developed and filed its HFPL UNE tariff as an accommodation to CLECs, to eliminate the need for CLECs to first negotiate and enter into interconnection agreements (or agreement amendments) to obtain the HFPL UNE. In instances where, as here, the incumbent LEC voluntarily files a UNE tariff to provide CLECs with an additional way of obtaining a UNE that otherwise would not be available to them, the Commission should refrain from imposing new unbundling obligations as part of that tariff. Indeed, if the Commission were to do otherwise, it only would discourage Ameritech Illinois and other incumbent LECs from voluntarily filing additional UNE tariffs in the future.

2. Under Controlling Federal Law, The Commission Lacks The Authority To Require Ameritech Illinois To Incorporate New Unbundling Obligations In Ameritech Illinois' HFPL UNE Tariff.

The Seventh Circuit has held that the unbundled network element access and interconnection rights and obligations established by the Act are not self- executing, but rather "exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition." *Goldwasser v. Ameritech Corp.*, 1998 WL 60878, *11 (N.D. Ill. Feb. 4, 1998), aff'd, 222 F.3d 390 (7th Cir. 2000) (emphasis added). Section 251(c)(1) requires both incumbent LECs and CLECs to "negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in" Sections 251(b) and (c) (emphasis added). Section 252 "sets forth the procedures that individual entrants and incumbent LECs must follow when implementing the requirements of Section 251."[2] This scheme which makes the "interconnection agreement" the vehicle by which CLECs may take advantage of any valid federal and state interconnection and unbundling requirements – simply cannot be reconciled with the notion that this Commission can require Ameritech Illinois to tariff any additional interconnection or UNE obligations that this Commission may impose.

The broad principles that support this conclusion were cogently articulated in *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157 (D. Or. 1999), where the court held that the Act's contract-centered framework preempts the use of state tariffs to implement unbundled access and interconnection duties. In that case, the state commission ordered GTE to file a tariff defining the terms and prices for all network elements the commission had decided

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[2] Opening Brief for the Federal Petitioners at 6, *FCC v. Iowa Utilities Board*, No. 97-831 (U.S., filed April 3, 1998) (available on Westlaw at 1998 WL 396945, *26) (emphasis added).

must be unbundled. GTE argued that this tariff process was preempted by the Act. The district court agreed, finding that the Oregon commission had illegally "dispensed with the interconnection agreement altogether and is allowing CLECs to order services 'off the rack' without an interconnection agreement." *Id.* at 1178. Such a procedure, the district court held, "bypasses the Act entirely and ignores the procedures and standards that Congress has established. The [state commission] may take steps to expedite the interconnection process, but it must do so within the overall framework established by the Act." *Ibid.* (emphasis added). Consequently, the court held that the UNE tariff "conflicts with the Act and is preempted." *Ibid.* The same reasoning applies here with respect to additional unbundling obligations not addressed by Ameritech Illinois' HFPL UNE tariff. Ameritech Illinois voluntarily filed that tariff to enable CLECs to obtain a *particular UNE* (the HFPL UNE) without first executing an interconnection agreement, not to enable CLECs to pursue other unbundling objectives. If this Commission concludes that it can and should impose additional unbundling or interconnection requirements on Ameritech Illinois, those obligations must be implemented through interconnection agreements, not tariffs.

There are several additional legal reasons why this Commission cannot and should not impose additional unbundling requirements on Ameritech Illinois through tariffs, rather than interconnection agreements. *First*, the Supreme Court has consistently held that federal law preempts state action that conflicts not only with substantive federal standards, but also with the procedural or administrative framework established by a federal statute – such as the Act's mandate that unbundling and interconnection obligations be implemented through interconnection agreements. In such cases, the Supreme Court "ha[s] been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law,

remedy, and administration." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). This is because "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971) (internal quotation marks omitted). In other words, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy," and therefore is equally subject to preemption. *Ibid.*

This principle is especially important where Congress, in asserting federal supremacy in an area of law, "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties," but also created "specially designed procedures" designed "to obtain uniform application of its substantive rules and to avoid th[ose] diversities and conflicts likely to result from a variety of local procedures." *Ibid.* In such cases — and the Act clearly presents such a case — "Congress plainly meant to do more than simply to alter the then-prevailing substantive law," but "sought as well to restructure fundamentally the processes for effectuating that policy." *Ibid.*; see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("*IUB II*" or "*AT&T Corp.*"). Thus, "[t]he technique of administration and the range and nature of those remedies that are and are not available [under a particular federal statute] is a fundamental part and parcel of the operative legal system," and state action that conflicts with or undermines that "technique of administration" is preempted. *Lockridge*, 403 U.S. at 287 (emphasis added).

The Act's "technique of administration" (i.e., the creation of individualized interconnection agreements) and the "range and nature of those remedies that are . . . available" (i.e., exclusive federal court review) is a "fundamental part" of the Act's regulation of

telecommunications. Congress' choice of interconnection agreements as the exclusive vehicle for implementing the Act's local competition provisions is every bit as important as the Act's substantive requirements. At a minimum, it clearly would be contrary to federal law for the Commission to use state tariffs, rather than interconnection agreements, to implement additional unbundling obligations.

Second, allowing state commissions to impose additional unbundling obligations via tariffs likely would nullify the Section 252 negotiation process. If CLECs were permitted to simply opt into state-mandated tariffs that imposed such additional unbundling obligations, this would effectively eliminate the need for negotiations by providing CLECs with an alternative method for obtaining such unbundling. Indeed, it is no exaggeration to say that *requiring* ILECs to tariff additional unbundling obligations, and permitting CLECs to order items "off the rack," would render section 252 a dead letter in Illinois. There would be little point to spending 135-160 days negotiating an interconnection agreement with a CLEC, and then arbitrating the disputed issues, if at any time in the future the CLEC could simply unilaterally abrogate the agreement and take a different or conflicting term or condition from a tariff.

Given the above, even if the Commission believes it is appropriate to impose additional unbundling obligations on Ameritech Illinois (which it is not, for the reasons described below), the Commission lacks authority to impose and implement those additional obligations outside the negotiation and arbitration processes prescribed in the Act.

B. THE SCOPE OF THE COMMISSION'S AUTHORITY TO PRESCRIBE ADDITIONAL UNES OR MODIFY CONDITIONS OF UNE ACCESS BEYOND THOSE ESTABLISHED BY THE FCC'S RULES

Putting aside momentarily the unique legal limitations that apply to a UNE tariff investigation such as this proceeding, the concept of an unbundled network element — and the obligation imposed on incumbent LECs to unbundle certain of the elements in their networks —

arise from the Act. Section 251(d)(1) of the Act authorized the FCC to require incumbent LECs to unbundled certain "network elements," as defined by the Act (47 U.S.C. § 153 (29)). But before doing so, the Act requires the FCC to determine that such unbundling satisfies the "necessary" and "impair" tests of Section 251 (d)(2) of the Act. *See IUB II*, 525 U.S. at 388-392. In the wake of *IUB II*, the FCC fleshed out and codified these tests in its *UNE Remand Order* (paras. 30-116) and its Rule 317 (47 C.F.R. § 51.317). The FCC applied those statutory tests in the *UNE Remand Order* to establish a national list of UNEs, which is codified at 47 C.F.R. § 51.319 ("Rule 319").

There are several legal principles that flow from these facts.

1. The Commission Cannot Unbundle Additional Network Elements or Modify Conditions of UNE Access Established By The FCC Unless It First Complies With FCC Rule 317 and Section 251(d)(2) Of The Act.

First, a state commission can add to the FCC's unbundling rules, including the FCC's national list of UNEs, only if it complies with and conducts all of the analyses required by FCC Rule 317. See 47 C.F.R. § 51.317(b)(4). As the Supreme Court and the FCC have concluded, these analyses are necessarily "fact intensive" and complex. Accordingly, such analyses must "consider the totality of the circumstances" and cannot be conducted based on conclusory, generalized CLEC allegations of a business need for a particular network element or elements to be unbundled. Nor can such analyses rely on CLEC claims that it would be more costly to provide service absent the additional unbundling that they seek. *See UNE Remand Order*,[3] ¶¶ 62, 142; *IUB II*, 525 U.S. at 389-392. Notably, the CLECs in this proceeding have failed to

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[3] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

provide any evidence sufficient to satisfy these tests in connection with their proposals to impose additional unbundling obligations on Ameritech Illinois.

2. The Commission Cannot Collaterally Attack FCC Decisions That Implement The Act's Unbundling Rules.

Second, a state commission cannot collaterally attack FCC rulings that implement the Act's unbundling rules. Yet that is exactly what the CLECs' additional unbundling proposals — in particular, Rhythms' proposal that the Commission require Ameritech Illinois to unbundle its Project Pronto network and AT&T's proposal that the Commission require Ameritech Illinois to unbundle its splitters — would have this Commission do. In fact, in each of these cases, the CLECs have petitioned the FCC for reconsideration of its relevant decisions (the *UNE Remand Order*, the *Line Sharing Order*, and the *Project Pronto Order*[4]), in which the FCC declined to authorize the additional unbundling that the CLECs seek here.

There is nothing wrong with the CLECs asking the FCC to reconsider its decisions on these unbundling issues. In fact, that is the only proper way to challenge an FCC determination — seek rehearing and then, if necessary, take a direct appeal from the FCC's decision under the Hobbs Act (28 U.S.C. § 2342(1)). In this proceeding, however, the CLECs are merely forum shopping, in the hope that this Commission will give them something that the FCC already has declined to give them. And the CLECs are doing so even though the FCC is currently considering their proposals for additional unbundling in connection with the CLECs' petitions for reconsideration and with separate, pending, further proposed rulemaking proceedings. The Commission should not — and legally cannot — impose on Ameritech Illinois further

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[4] *See Ameritech Corp. and SBC Communications Inc., Petition for Consent to Transfer Control of Corporations Holding Commission Licenses and line Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Communications Rules, Second Memorandum Opinion and Order,* CC Docket 98-141. FCC 00-336 (rel. Sept. 8, 2000) at paras. 41-42, 46 *("Project Pronto Order").*

unbundling obligations that the CLECs, by seeking rehearing of the *UNE Remand Order*, the *Line Sharing Order* and the *Project Pronto Order*, have already conceded are not currently required by the FCC. Collateral attacks on FCC orders that are subject to direct review are not permitted under the governing law. *FCC v. ITT World Comm., Inc.*, 466 U.S. 463, 468 (1984); *Wilson v. A.H. Belo, Inc.*, 87 F.3d 393, 399-400 (9th Cir. 1996); *Michigan Bell Tel. Co. v. Strand*, 26 F.Supp.2d 993 (W.D. Mich. 1999).

3. Where the FCC has Addressed a Particular Unbundling Issue, the FCC's Conclusion is Controlling.

Third, any state commission-imposed unbundling requirements must be consistent with the Act and the FCC's rules. Thus, to the extent that the FCC has already addressed a particular issue in establishing its unbundling rules (*e.g.*, whether incumbent LECs should be required to unbundle packet switching functionality), the FCC's conclusion on that issue is controlling, and state commission actions that are inconsistent with the FCC's conclusion are preempted. The CLECs' additional unbundling proposals in this proceeding ignore this legal limit.

II. "LINE SHARING" OVER THE PROJECT PRONTO NETWORK

A. UNBUNDLED ACCESS TO PROJECT PRONTO FACILITIES

1. Applicable Legal Standards.

The applicable legal standards for determining whether the Commission can or should order Ameritech Illinois to revise its HFPL UNE tariff to unbundle its Project Pronto network and permit collocation of CLEC line cards in Project Pronto NGDLCs are set forth in Section I above. For the reasons explained below, the CLECs' proposal satisfies none of these legal standards.